IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1352

IOWA INDEPENDENT BANKERS, an Iowa Nonprofit Corporation,

Petitioner,

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Iowa Independent Bankers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The decision of the court below is not yet reported. It is printed as Appendix A. The decision of the Board of Governors of the Federal Reserve System is printed as Appendix B.

JURISDICTION

The case was decided by the United States Court of Ap-

peals for the District of Columbia Circuit on February 7, 1975, and judgment was entered on that date.

The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a state statute which creates a closed class consisting of only one "out-of-state" bank holding company and confers a special benefit on such company violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

2. Whether a state, pursuant to 12 *U.S.C.* §1846 of the Bank Holding Company Act, may confer a special benefit on only one "out-of-state" bank holding company when authorizing bank acquisitions under 12 *U.S.C.* §1842(d) of the Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, section 1, the Equal Protection Clause:

> . . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Bank Holding Company Act of 1956, section 3(d), 12 *U.S.C.* §1842(d):

> Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the state in which such bank holding company maintains its principal office and place of business or in which it conducts its principal operations unless the acqusition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication.

Bank Holding Company Act of 1956, section 7, 12 *U.S.C.* §1846:

> The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

Code of Iowa, §524.1805:

> Nothing in this division shall be construed to authorize a bank holding company which is with respect to the State of Iowa, an 'out-of-State bank holding company' as defined or referred to in 12 U.S.C. §1842(d), as amended to January 1, 1971, to acquire any of the voting shares of, any interest in, all or substantially all of the assets of, or power to control in any manner the election of any of the directors of any bank in this State, *unless such bank holding company was on January 1, 1971, registered with the Federal Reserve Board as a bank holding company, and on that date owned at least two banks in this State*. (Emphasis added.)

STATEMENT OF THE CASE

An "out-of-state" bank holding company may acquire a bank in a state only if such a transaction is specifically authorized by the statute laws of the State in which such bank is located. 12 *U.S.C.* §1842(d). Northwest Ban-

corporation, a Minneapolis-based bank holding company, the seventh largest bank holding company in the nation, is an "out-of-state" bank holding company in Iowa.

In 1972 the Iowa legislature passed a statute which singled out Northwest Bancorporation as the only out-of-state bank holding company to be permitted to acquire Iowa banks. *Iowa Code*, §524.1805. This law created a closed class, consisting of only one company, Northwest, which had certain characteristics in 1971, more than a year before the Act was passed. Northwest is the only bank holding company which can ever qualify under this standard. The record establishes that the legislature was aware that it was granting this privilege to one corporation.

Shortly after the state law took effect, Northwest sought permission from the Federal Reserve Board to acquire two additional Iowa banks. Iowa Independent Bankers, a trade association, filed an objection to the acquisitions. The Federal Reserve Board refused to rule on petitioners' challenges to the validity of the Iowa law and approved the acquisitions on August 2, 1973 (App. B). Iowa Independent Bankers sought review in the Court of Appeals for the District of Columbia Circuit, pursuant to 12 *U.S.C.* §1848. Both the Board and Northwest argued that Iowa Independent Bankers lacked standing and that the Court of Appeals should abstain from ruling on the validity of the underlying Iowa Act. The Court of Appeals found that the petitioner had standing and that it should not abstain. It upheld the Iowa law and affirmed the action of the Board (App. A).

REASONS FOR GRANTING THE WRIT

1. The decision below is inconsistent with applicable decisions of this Court.

This case presents one of those rare instances where state regulation of economic activity violates the Equal Protection Clause. As in *Morey v. Doud*, 354 U.S. 457 (1957), a state legislature has singled out one company for special benefit. Since the purpose of the Iowa law in regulating bank acquisitions by out-of-state bank holding companies can only be to provide continuing protection to the citizens of Iowa, a standard fixed on the basis of pre-1971 performance can have no rational relationship. As this Court stated in *Morey*:

> the statute was intended to afford the public *continuing* protection. The discrimination in favor of American Express does not conform to this purpose . . . 354 U.S. at 466-7 (Emphasis in original.)

The Court of Appeals relied on past performance to provide a basis for the state law in this case. Discrimination between two out-of-state bank holding companies in 1975 can hardly be justified on the basis of one having assets in a particular state before 1971. In light of *Morey*, such a justification is inadequate. To meet the test of Equal Protection, the discrimination or classification must have a reasonable basis which is related to a legitimate state purpose. Mere reward of Northwest for past performance cannot be such a purpose.

This is not a case of a permissible "grandfather clause," like that in *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970). Rather it is a "grandfather upon a grandfather." It does more than permit a

pre-existing enterprise to continue its existing business; it permits that enterprise to acquire additional buisnesses. This is beyond the scope of a traditional grandfather clause. Cf. *Stanley v. Public Util. Comm'n*, 295 U.S. 76 (1935), *Sampere v. City of New Orleans*, 279 U.S. 812 (1929), *aff'g*, 166 La. 766, 117 So. 827 (1928).

Furthermore, since passage of the *Bank Holding Act* in 1956, Northwest as an "out-of-state" bank holding company has been prohibited from acquiring additional banks in Iowa (12 *U.S.C.* §1842(d). However, bank holding companies in Iowa which are not "out-of-state" have had the continued right since 1956 to acquire additional banks in Iowa (12 *U.S.C.* §1842(a)). Now, *after a 15 year interval*, Iowa seeks to justify the legislative classification in favor of Northwest alone by attempting to put all bank holding companies operating in Iowa prior to January 1, 1971 on the same basis. But the Iowa statute (Section 524.1805) did not confer any additional rights on the bank holding companies in Iowa which were not "out-of-state". The discrimination without a legitimate purpose is thus patent.

Other courts have held such preferences for single companies to be improper. Recently the Court of Appeals for the Fifth Circuit, applying *Morey v. Doud, supra*, held unconstitutional a New Orleans ordinance which granted exclusive rights to sell hot dogs in the French Quarter to the company which had sold hot dogs there for the previous eight years. *Dukes v. City of New Orleans*, 501 F.2d 706 (5th Cir. 1974), *hearing on merits granted, jurisdiction, postponed sub nom. City of New Orleans v. Dukes*, 43 U.S.L.W. 3550 (U.S. April 14, 1975) (No. 74-775). See

also, *Adams v. City of Park Ridge*, 293 F.2d 585 (7th Cir. 1961) (exemption for "Community Chest" held unconstitutional).

2. This case should be considered with *City of New Orleans v. Dukes*, (No. 74-775).

This Court has ordered hearing on the merits of *City of New Orleans v. Dukes*, 43 U.S.L.W. 3550, postponing consideration of jurisdiction to argument on the merits. This case raises the same substantive issue as *Dukes*, i.e., the extent to which "grandfather clauses" may be used, consistent with Fourteenth Amendment Equal Protection guarantees. Arguments about Supreme Court jurisdiction to hear the *Dukes* case would not apply here, since certiorari is clearly the appropriate remedy. The merits of the constitutional issue can thus be more readily reached on the record in the present case.

If certiorari is granted, this case should be consolidated for argument with *Dukes*, because the same substantive constitutional rules should apply to both cases, and in order to prevent any jurisdictional obstacle in the *Dukes* proceedings from precluding full review of those constitutional issues.

3. The decision below raises an important question of federal law upon which this Court should rule.

The Iowa law is the first state law, since the enactment of the Bank Holding Company Act in 1956, to permit *any* out-of-state bank holding company to acquire local banks. If Iowa's designation of a single company for this privilege is upheld, other states may follow suit, designating their own preferred holding companies.

A large out-of-state bank holding company has a significant competitive advantage over smaller in-state holding companies. In this case, Northwest's total deposits in seven states, nearly $4.4 billion, are more than half of the total deposits of all banks in Iowa, $7.3 billion. Under the Iowa law, Northwest will not be subject to competition from other similarly-situated large holding companies.

The *Bank Holding Company Act*, 12 U.S.C. §1842(d) should be construed to require a state to legislate in general terms, so as not to permit it to favor a single holding company.

CONCLUSION

For the reasons stated above, petitioner respectfully requests that a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia Circuit to review its decision in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1952

IOWA INDEPENDENT BANKERS, AN IOWA NON-PROFIT CORPORATION,

Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

and

NORTHWEST BANCORPORATION,

Intervenor.

Petition for Review of an Order of the Board of Governors of the Federal Reserve System

---

Decided February 7, 1975

* * * * *

Before: Tamm and Leventhal, *Circuit Judges* and Merhige,* *United States District Judge* for the Eastern District of Virginia

Opinion for the Court filed by *Circuit Judge* Tamm.

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*Sitting by designation pursuant to 28 U.S.C. § 292(d).

Tamm, *Circuit Judge: Iowa Independent Bankers,* (Iowa Bankers), an association of over 400 Iowa banks, petitions this court to set aside an order of respondent, Board of Governors of the Federal Reserve System, (the Board), approving the acquisition of two Iowa banks by Northwest Bancorporation (Northwest). Petitioner argues principally that the Iowa statute authorizing the acquisition violates the fouteenth amendment to the United States Constitution, conflicts with federal law governing bank holding companies, and violates certain provisions of the Iowa Constituion. We reject petitioner's arguments and deny the petition.

I. INTRODUCTION

The bank holding company is a popular device for expansion in states that limit or prohibit financial institutions from engaging in branch banking.[1] Since 1956, the federal government has regulated this field through the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-50 (1970). As part of the regulatory scheme, bank holding companies must register with the Board of Governors of the Federal Reserve System and must obtain its approval prior to culminating any acquisitions. 12 U.S.C. § 1842(a). Nevertheless, even after passage of the Act, the states still retained significant responsibility for regulating the banking industry within their borders. In section 1846, Congress reserved to each state "such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." Of greater importance to this litigation is another limitation placed upon the Board, specifically section 1842 (d), which provides that no acquisition of a state bank by

[1] *See* H.R. Rep. No. 609, 84th Cong., 1st Sess. 6-7 (1955).

an out-of-state bank holding company will be approved unless such an acquisition "is specifically authorized by the statute laws of the State in which such bank [the acquiree] is located, by language to that effect and not merely by implication."

In 1972, the Iowa legislature revised its banking laws, adding several sections regulating bank holding companies, including the following:

> Nothing in this division shall be construed to authorize a bank holding company which is with respect to the state of Iowa, an "out-of-state bank holding company" . . . to acquire any . . . interest in . . . any bank in this state, unless such bank holding company was on January 1, 1971, registered with the federal reserve board as a bank holding company, and on that date owned at least two banks in this state.

Iowa Code Ann. § 524.1805 (Supp. 1974-1975). The legality of this statute is the primary issue in this litigation.

At the time the statute was passed, Northwest was the only out-of-state bank holding company that controlled any banks in Iowa. Within several months of the enactment of section 524.1805, Northwest arranged to acquire controlling interests in two Iowa banks, Bettendorf Bank and Keokuk Bank, and applied to the Board for approval. The Board invited comments by interested persons, and Iowa Bankers, some of whose members would become competitors of Northwest if approval was granted, raised objections. Iowa Bankers argued that approval could not be granted because section 524.1805 violated the equal protection clause of the fourteenth amendment to the United States Constitution, and violated the equality, gen-

eral and uniform, and no exclusive privilege clauses of the Iowa Constitution; consequently, the acquisition of Iowa banks by an out-of-state bank holding company was not expressly authorized by a valid law as required by section 3 of the Bank Holding Company Act, 12 U.S.C. § 1842 (d).[2] Petitioner also argued that the intent of Congress in passing this section of the Act was to prohibit the states from selectively allowing bank holding company expansion across state lines, and section 1842 (d), in fact, prohibited the Iowa Legislature from enacting such a statute. *Northwest Bancorporation*, 38 Fed. Reg. 21531-32 (1973). Finally, Iowa Bankers maintained that the proposed acquisition would have anticompetitive effects. *Id.* at 21531.

The Board approved the application, finding that the acquisition would not be anticompetitive but would promote competition in the affected area. *Id.*[3] It also concluded that section 524.1805 did not conflict with the intent of Congress, since 12 U.S.C. § 1846 expressly reserved to the states all power and jurisdiction that they possessed before passage of the Act. *Id.* at 21532. However, the Board refused to rule on the constitutional objections raised by Iowa Bankers, stating:

> As required by *Whitney* [*Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965)] the Board considers the applicability and effect of State legislation, but the constitutional validity thereof is presumed; and objectors' challenges to the constitutionality of the recently-enacted Iowa legislation in this matter are properly cognizable only by the judiciary.

Id. (citation omitted).[4]

Dissatisfied with the Board's approval, Iowa Bankers petitions this court to set aside the Board's order. Northwest has intervened on the Board's side.

II. STANDING

At the threshold, we are confronted by Northwest's contention that petitioner does not have standing to raise the constitutional issues as neither it nor its constituents are members of the class discriminated against. We believe that this argument is untenable, the result of confusing the distinct concepts of standing to sue and standing to assert the rights of others once properly before the court. We hold that petitioner has standing to raise the constitutional issues before this court.

In the first instance, petitioner undeniably has stand-

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[2] § 1842(d). Limitation by State boundaries.

Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidaries are largest.

[3] Iowa Bankers has not challenged the validity of this finding on appeal.

[4] Petitioner in this action has not challenged the validity of the Board's interpretation of its mandate. Since the parties have not briefed this issue and its resolution would not change the outcome of this case, we have decided to leave it open for future determination. However, we feel constrained to register our substantial doubt that the Board can continue to presume conclusively the constitutional validity of state or federal laws in light of the Supreme Court's opinion in *Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965).

ing to sue. Such standing is conferred upon petitioner statutorily, as 12 U.S.C. § 1848 provides that "[a]ny party aggrieved by an order of the Board" under the Act is entitled to judicial review in this court. Section 1850, added by the 1970 amendments, further defines the class of "parties aggrieved" to include those who are or would become competitors of the applicant if the acquisition was approved. Thus, any bank that competes with the Bettendorf or Keokuk Banks has the right to seek judicial review of the Board's order. Since several of petitioner's member banks compete with the Bettendorf or Keokuk Banks, petitioner is properly before this court. *See Sierra Club v. Morton*, 405 U.S. 727 (1972).

Once properly before this court, the question becomes may petitioner assert in this proceeding the rights of those out-of-state bank holding companies that are allegedly being discriminated against. We think that the Supreme Court's decision in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), controls, and requires that we answer this question affirmatively. In *Sanders*, the Court considered a challenge to the standing of a party under section 402 (b) of the Communications Act of 1934, 47 U.S.C. § 402 (b) (1970), which provides for judicial review by the applicant for a permit or "by any other person aggrieved." Rejecting the contention that since economic injury to a competitor was not a ground for refusing to issue a broadcast license, Sanders, as a competitor, could not seek review of a license grant, the Court stated that:

> Congress had some purpose in enacting § 402 (b) (2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring

> to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.
>
> We hold, therefore, that the respondent had the requisite standing to appeal and to raise, in the court below, any relevant question of law in respect of the order of the Commission.

309 U.S. at 477 (footnote omitted).

Just as the respondent in *Sanders* could properly seek judicial review of "any relevant question of law in respect of the order of the Commission," petitioner here may raise before this court any objection to the Board's decision, including any state and federal constitutional claims. *See Sierra Club v. Morton, supra,* 405 U.S. at 736-38, 740 n.15; *Scripps-Howard Radio, Inc. v. FCC,* 316 U.S. 4, 14 (1942); 3 K. Davis, *Administrative Law Treatise* § 22.07 (1958)

III. THE MERITS

A. *Equal Protection.*

Petitioner's first argument is that section 524.1805 of the Iowa Code. set out in Part I, violates the equal protection clause of the fourteenth amendment by creating two classes of out-of-state bank holding companies: one, composed of those out-of-state bank holding companies that control only one Iowa bank or do not control any Iowa banks, cannot acquire banks within Iowa; the other, composed of all out-of-state bank holding companies controlling two or more Iowa banks, may acquire additional Iowa banks. In fact, the only member of the latter class is Northwest, the sole beneficiary of the legislation. Iowa

Bankers contends that this situation creates an invidious discrimination prohibited by the equal protection clause.

Petitioner recognizes that since the Iowa statute neither creates a suspect classification nor impinges upon fundamental rights, our review is limited to determining whether the statute bears a rational relationship to a legitimate state purpose. *E.G., Village of Belle Terre v. Boraas,* 416 U.S. 1, 6-8 (1974); *Dandridge v. Williams,* 397 U.S. 471, 484-86 (1970). However, petitioner contends that the statute lacks such a relationship, analogizing the classification to that in *Morey v. Doud,* 354 U.S. 457 (1957). We cannot accept petitioner's contention, as there is a rational, non-discriminatory justification for the legislature's action.

The initial error in petitioner's reasoning is its incorrect definition of the classes created by the statute. Since there are no out-of-state bank holding companies that control only one Iowa bank, the line actually drawn by the Iowa legislature is between out-of-state bank holding companies that have some pre-existing stake in the Iowa banking system by *virtue of past ownership of in-state banks,* and those out-of-state bank holding companies that do not. We think it is perfectly rational for the Iowa legislature to determine that Northwest, the only out-of-state bank holding company that has a pre-existing stake in the Iowa banking system and has proven itself to be a positive force in the system, should be allowed to compete on the same basis as other Iowa banks, but also to decide that the state would not be well served if out-of-state bank holding companies were allowed wholesale entry into the Iowa market. This was precisely the intent of the Iowa legislature as the following excerpt from a report by the joint legislative committee that drafted the Iowa bank holding company legislation reveals:

> One out-of-state bank holding company, Northwest Bancorporation of Minnesota, has owned four banks in Iowa since before 1956. The Study Committee believes the firm has shown itself to be a good citizen of the Iowa business community, and should be allowed the same benefits of state law as the domestic bank holding companies. However, it is not considered desirable to leave the state's banking structure open to entry byy outside bank holding companies generally, some of which might be too large and too far-flung to be effectively regulated by the Iowa Department of Banking.[5]

In short, the legislature intended to allow all pre-existing bank holding companies, whether in-state or out-of-state, to compete on an equal basis, while preventing a new influx of out-of-state bank holding companies into Iowa. We think that this is precisely the type of "grandfathering" that has been repeatedly approved by the Supreme Court. *See, e.g., United States v. Maryland Savings-Share Insurance Corp.,* 400 U.S. 4 (1970); *Sampere v. New Orleans,* 279 U.S. 812 (1929), *affg per curiam,* 166 La. 776, 117 So. 827 (1928); *Watson v. Maryland,* 218 U.S. 173 (1910).

That the statute on its face draws the line between those out-of-state bank holding companies with one Iowa bank, and those with two or more is without consequence for

[5]Final Report of the BANK HOLDING COMPANIES STUDY COMMITTEE at 14 (December 8, 1971). The Bank Holding Companies Study Committee was a joint committee established by the Sixty-fourth Iowa General Assembly, First Session, to determine whether revisions in the Iowa banking laws were necessary, and to prepare new legislation. The committee held numerous hearings and issued its final report with recommended revisions in the banking law. The committee's proposals concerning bank holding companies were adopted by the Iowa Senate and House with only minor changes not relevant here.

equal protection purposes. As mentioned *supra*, all parties concede that at all relevant times, Northwest, which controlled four Iowa banks, was the only out-of-state bank holding company that owned any Iowa banks. As no out-of-state bank holding company owned only one Iowa bank, any discrimination with respect to such bank holding companies is purely hypothetical and without substance. We do not think that the Iowa legislature, dealing as it must with the realities of the Iowa banking structure, must draw its statutes to encompass hypothetical situations that could never bear the fruits of reality.[6] *See Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911). The realities of the situation do not reveal any classification not supported by a rational basis.

We also believe that petitioner's reliance on *Morey v. Doud, supra,* is misplaced. In *Morey*, the Supreme Court invalidated on equal protection grounds an Illinois statute designed to comprehensively regulate the currency exchange business, but which expressly excepted the American Express Company from such regulation. The Court concluded that this named exception from the controls to which other companies were subject could not be rationalized with the Illinois legislature's goal of "continuing" protection for the public, since American Express, though undoubtedly financially secure at the time, might

[6]We note also that the line drawn by the legislature in section 524.1805 is congruent with the Iowa Code definition of a bank holding company, which provides that a bank holding company "means any . . . organization, other than an individual, which directly or indirectly owns or controls . . . two or more banks . . . . IOWA CODE ANN. § 524.1801. The Bank Holding Companies Study Committee recommended this definition, despite the fact that the federal definition had been amended in 1970 to include one-bank holding compaines, because of a concern that since many one-bank holding companies could continue to engage in nonbanking activities, *see* 12 U.S.C. § 1843 (a) (2), they would be difficult to regulate. Final Report of the BANK HOLDING COMPANIES STUDY COMMITTEE, *supra* at 4, 14.

not remain solvent in the future. *Id.* at 466-67. Thus, the significance of the case is not, as petitioner maintains, the mere fact that a named recipient was given a privilege that others were not, but rather that the privilege bestowed upon one enterprise among many existing enterprises already competing in the same market was not rationally related to the legislature's purpose.

Although the facts in the case *sub judice* bear a surface relationship to those in *Morey*, when viewed more closely they are quite the opposite. Unlike *Morey*, the legislation here is not designed to bestow a benefit upon one competitor over all others, but merely to allow Northwest to compete on an equal basis with other Iowa banks.[7] We can find no violation of the equal protection clause under these circumstances.[8]

B. The Alleged Conflict between State and Federal Law

Petitioner's second argument is based on the premise that section 524.1805 conflicts with the intent of Congress

[7]The fact that the Iowa statute does not bestow a benefit on one competitor among many existing competitors distinguishes this case from *Dukes v. New Orleans*, 501 F.2d 706 (5th Cir. 1974) which relied on *Morey v. Doud* to overturn a city ordinance that gave a monopoly to a hot dog vendor by forcing out an existing competitor through the use of a grandfather clause.

[8]Petitioner also argues that section 3(d) of the Bank Holding Company Act, 12 U.S.C. § 1842(d), violates the guaranty of equal protection inherent in the fifth amendment due process clause to the extent that statute authorizes the states to discriminate between bank holding companies. We reject this argument as we find it indistinguishable with a similar argument rejected by the Supreme Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969). Responding to the argument that Congress had authorized a one-year waiting requirement for AFDC benefits that was found to be invidiously discriminatory, the Court stated "[b]ut even if we were to assume, *arguendo*, that Congress did approve the imposition of a one-year waiting period, it is the responsive *state* legislation which infringes constitutional rights. By itself § 402 (b) has absolutely no restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question." *Id.* at 641.

as embodied in the Douglas amendment to the Bank Holding Company Act. Douglas amendment, 12 U.S.C. § 1842 (d),[9] prohibits bank holding companies from acquiring banks in other states unless such an interstate acquisition is specifically authorized by a law of the acquiree state. Petitioner maintains that implicit in the Douglas amendment is a prohibition against discrimination between out-of-state bank holding companies. In other words, petitioner argues that under section 1842 (d), the states can only decide whether to extend the right to acquire in-state banks to all out-of-state bank holding companies or to prohibit such acquisitions entirely.

We note at the outset that nothing in the language of section 1842 (d) points to this result, and petitioner has not relied on any statutory language. Moreover, petitioner's reading of section 1842 (d) conflicts with section 1846, which reserves to the states all power and jurisdiction in effect before the Act,[10] for there can be no doubt that prior to the passabe of the Act, the states were free to regulate in-state bank acquisitions by out-of-state bank holding companies. The only support that petitioner offers for its proposition is two paragraphs of a statement made by Senator Douglas during the Senate floor debate:

> I wish to repeat that, so far as interstate acquisition of banks is concerned, namely, purchase by bank holding companies of banks in other States, the provision in my amendment is in principle almost

[9] *See* note 2, *supra*.

[10] § 1846 Reservation of rights to States.
The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

> identical with the present provision which governs branch banking.
>
> Therefore, it is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy and, of course, under the McFadden Act, even to expand within a State.

102 *Cong. Rec.* 6860 (1956). However, whatever support these two paragraphs offer evaporates when the entire statement of Senator Douglas and the statements of other senators involved in the debate are read.[11] Not once in the entire debate is the discrimination question raised. Moreover, in the paragraph immediately before the two cited in petitioner's brief, Senator Douglas seems to anticipate that states might be selective in allowing bank holding companies to cross state lines:

> Even with my amendment, the Federal Reserve Board would still have final jurisdiction over the acquisition of banks or bank holding companies within a given State, that is, intrastate acquisitions. If and when individual States permitted *a bank holding company* from another State to acquire assets across State lines, then the Fdeeral Reserve Board would have final jurisdiction in those cases as well.

102 *Cong. Rec.* 6860 (1956) (emphasis added). Lastly, it is obvious even from the quotation that the intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding

[11] The significant portions of the Senate debate are found at 102 CONG. REC. 6750-58, 6854-62 (1956).

companies across state lines so that such expansion would not contravene state policy. Petitioner's suggested interpretation of section 1842 (d) would rob the states of this power. In short, we think that petitioner has failed to demonstrate that Congress intended to bar discriminations of the sort found in *Iowa Code Ann.* § 524.1805. Accordingly, we find no conflict between the Iowa statute and federal statutory law.

C. *The Iowa Constitutional Issues*

Along with its federal claims, petitioner asserts that section 524.1805 of the Iowa Code contravenes three provisions of the Iowa Constitution: article I, section 6, the "equality" clause; article III, section 30, the "general and uniform" clause; and article VIII, section 12, the "no exclusive privilege" clause. We find that petitioner's contention lacks merit and hold that section 524.1805 does not offend against the Iowa Constitution. We examine the constitutionality of each provision in turn.

Petitioner claims that section 524.1805 contravenes the guaranty of equal treatment to the people of Iowa embodied in article I, section 6.[12] However, petitioner is forced by the overwhelming weight of Iowa case law to admit that "[t]he Iowa Supreme Court has held that these state constitutional provisions [art. I, sec. 6, art. III, sec. 30] articulate the same principle contained in the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution." Petitioner's Br. at 14. *See, e.g., Brown Enterprises, Inc. v. Fulton,* —— Ia. —, 192

[12]Article I, section 6 provides that:
All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens privileges or immuniites, which, upon the same terms shall not equally belong to all citizens.

N.W.2d 773 (1971); *State v. Kappos,* —— Ia. ——, 189 N.W.2d 563, *cert. denied and appeal dismissed,* 405 U.S. 982 (1971). *Becker v. Board of Education,* 258 Ia. 277, 138 N.W.2d 909 (1965); *Chicago and Northwestern Ry. Co. v. Fachman,* 255 Ia. 989, 125 N.W.2d 210 (1963). Thus, its argument rests on the proposition that although the fourteenth amendment protects against the same evils as the equality clause of the state constitution, Iowa applies the equality clause more rigorously. We do not believe, however, that the Iowa cases interpreting the equality clause have placed such a construction on it.

Petitioner cites only two cases in support of its interpretation of the equality clause. The first case, *Chicago and Northwestern Ry. Co. v. Fachman, supra,* clearly cannot support petitioner's position, as the Iowa Supreme Court specifically treated the federal equal protection clause and the Iowa equality clause as interchangeable, and rested its decision on both constitutions. *Id.* at 125 N.W.2d 213. Moreover, the reason that the *Fachman* court invalidated the statute—that there was no reasonable basis for its under inclusiveness—suggests nothing more than traditional equal protection analysis. *See id.* at 125 N.W.2d 215. The second case, *Sperry & Hutchinson Co. v. Hoegh,* 246 Ia. 9, 65 N.W.2d 410 (1954), although basing its holding strictly on article I, section 6 of the Iowa Constitution, has been cited by the Iowa Supreme Court in a later case for the proposition that the Iowa interpretation of its equality clause is the same as United States Supreme Court's interpretation of the equal protection clause. *Becker v. Board of Education, supra,* 138 N.W.2d at 912. Furthermore, it is difficult to see how the Iowa Supreme Court's holding in *Sperry & Hutchinson*

adds to petitioner's analysis. That case dealt with an Iowa law that forbade the use of trading stamps not redeemed by the merchant that issued them. The court initially opined that regulation of trading stamps was in all probability an improper exercise of the police power. *Id.* at 65 N.W.2d 414-16. Having taken a narrow view of such power, the court concluded that any police power justification for prohibiting trading stamps issued and redeemed by third parties such as *Sperry & Hutchinson* also applied to merchant-redeemed stamps, which were not prohibited, and invalidated the statute as being an arbitrary classification. Id. at 416-17. Thus, the case is not a departure from traditional equal protection analysis, since the court merely required a reasonable basis for the classification. The scrutiny seems stricter because of the Iowa Court's narrow view of the police power. However, in the present case no police power issue is evident; clearly the Iowa legislature has the power to regulate the structure of the Iowa banking industry.

Finally, petitioner's contention is weakened by its admission that *Fachman* and *Sperry & Hutchinson* stand only for the proposition that there be some reasonable relationship between the classification and a legitimate public purpose. Petitioner's Br. at 17-18. As already indicated in Part III, A, the Iowa legisltaure could legitimately decide that Northwest, because of its past participation in Iowa banking, should continue to participate but that out-of-state bank holding companies with no prior stake should not. Given this legitimate end, and that the legislation enacted produces exactly this result, we think that petitioner's "equality" clause argument must fall.

Petitioner's second state constitutional argument is that section 524.1085 violates article III, section 30 of the Iowa Constitution. This provision absolutely forbids the passage of so-called special laws in six enumerated cases and then provides that "in all cases where a general law can be made applicable, all laws shall be general, and of a uniform operation throughout the State. . . ." Petitioner contends that since the class created by section 524.1805 is closed and contains only one beneficiary, it is a special law within the meaning of article III, section 30.

Since the statute does not fall into the six enumerated classes that absolutely prohibit special laws,[13] petitioner carries the burden of proving that the statute in question is a special law and that a general and uniform law could have been enacted in its place. *See e.g., Dickinson v. Porter,* 240 Ia. 393, 35 N.W.2d 66 (1948), *appeal dismissed,* 338 U.S. 843 (1949). Whether section 524.1805 is a special or general law is a substantial question to which both parties have addressed considerable argument. However, we need not decide this question, for assuming *arguendo* that section 524.1805 is a special law, it is abundantly clear that a general law could not have been substituted.

The most recent Iowa case to consider the issue of the

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[13]Article III, section 30 states that:

> The General Assembly shall not pass local or special laws in the following cases:
> (a) For the assessment and collection of taxes for State, County, or road purposes:
> (b) For laying out, opening, and working roads or highways;
> (c) For changing the names of persons;
> (d) For the incorporation of cities and towns;
> (e) For vacating roads, town plats, streets, alleys or public squares;
> (f) For locating or changing county seats.
>
> In all the cases above numerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State; . . .

applicability of a general law to a specific situation is *State Board of Regents v. Lindquist*, — *Ia.* —, 188 N.W. 2d 320 (1971), which upheld the validity of a statute that authorized the use of revenue bonds to finance additions to the University of Iowa Hospitals against an attack that included, *inter alia*, the contention that the statute violated article III, section 30. The court first held that the statute was a special law,[14] and then considered whether a general law could have been made applicable. Setting forth the standard for making this determination, the court stated that "[i]n determining whether a general law can be made applicable, courts consider the nature and purpose of the legislation and conditions and circumstances under which it was enacted." *Id.* at 188 N.W.2d 324. The conclusion reached by the Iowa Supreme Court in *Lindquist* is crucial to the present case, for although the statute dealt only with the hospitals at one university, the court held that:

> The evidence discloses that the schools of higher learning possess but a single major institution like this hospital and that this hospital, which needs enlargement, has peculiar revenue-producing capabilities making revenue bonds feasible. The state has the problem of this particular institution. Mindful of the presumption of validity which attends legislative acts, we believe the legislature was within its province in enacting a statute to deal with this special problem.

[14]The Iowa Supreme Court noted that "[i]f the statute had dealt with health care facilities at state establishments generally or even at all state schools of higher learning, it would be sufficiently broad in application as to be a general rather than a special law. . . ." State Board of Regents v. Lindquist, — Ia. —, 188 N.W.2d 320, 324 (1971).

Id.

In the case *sub judice*, the legislature made a perfectly legitimate decision to preclude out-of-state bank holding companies from acquiring banks in Iowa because of the concern that the state would be unable to regulate them effectively. However, it was faced with the problem of a particular institution, Northwest, which for many years had owned several Iowa banks and had proven to be a positive influence in the Iowa banking industry. The legislature thus made the decision that Northwest, the only out-of-state bank holding company that exhibited the special characteristic of favorable past participation in the Iowa banking industry, ought to be allowed to compete on the same basis as other Iowa banks. As Northwest was the only insitution with this special characteristic, the legislature could not have made applicable a general law that prohibited an influx of out-of-state bank holding companies and simultaneously allowed Northwest renewed access to the Iowa banking market.

Petitioner's last state constitutional argument is that section 524.1805 violates article VIII, section 12 of the Iowa Constitution, which provides that ". . . no exclusive privileges, except as in this article provided, shall ever be granted." This contention must fail as article VIII, section 12 has never been construed to prohibit the award of exclusive franchises, licenses, or other forms of exclusive agencies. Rather this provision has been construed narrowly to limit only the powers and rights that may be given to a corporation through its charter. *Iowa Telephone Co. Keokuk*, 226 F. 92-94 (S.D. Iowa 1915); *Des Moines Street Railway Co., v. Des Moines Broad-Gauge Street Railway Co.*, 73 Ia. 513, 33 N.W. 610, 615 ((1887). More-

over, petitioner's contention strains the meaning of the term "exclusive." Since Iowa domiciled bank holding companies have the same privilege to acquire banks, the grant to Northwest cannot be considered "exclusive."

In sum, petitioner's state constitutional objections must fail, just as its federal constitutional objections, and for much the same reasons. We are unable to conclude that the Iowa Constitution places greater restrictions upon legislative prerogative than does the federal constitution.[15]

IV. ABSTENTION

Both the Board and Northwest have suggested that this court should abstain from reaching a decision in this case because the statute in question has not been interpreted by the Iowa Supreme Court, nor has that court passed upon the validity of the statute under the state constitution. We considered this issue prior to making a definitive decision on the merits, and concluded that abstention would not be appropriate in this case. However, we thought it advisable to discuss the merits before explaining our reasons for not abstaining because we regognize that a preliminary examination of the issues is necessary to make a reasoned decision on the abstention question.

The nature of our federal system suggests that purely from the standpoint of the locus of decision-making, state courts should always decide issues of state law while federal courts should always adjudicate federal issues. Never-

[15]Petitioner also claims that IOWA CODE ANN. § 524.1805 does not specifically authorize the acquisition as required by 12 U.S.C. § 1842 (d). This argument is frivolous in light of the legislative history and an admission in Petitioner's Br. at 6 that Northwest "has also acknowledged that the Legislature was aware that the proviso (the last part of IOWA CODE ANN. § 524.1805) was for the specific benefit of only Northwest."

theless, the realities of the system often find state courts deciding issues of federal law and vice versa. *Cf. Wisconsin v. Constantineau,* 400 U.S. 433, 437-38 (1971). While Supreme Court review of state court decisions alleviates somewhat the problems presented by adjudication of federal issues in state forums, no such harmonizing influence is generally available with respect to the adjudication of state law in federal forums. The doctrine of abstention is designed to fill this vacuum.

Abstention, however, is not without its costs. As a practical matter, the burden of delay and expense to the parties may be considerable, especially where final resolution of the controversy requires litigation at the appellate level in both federal and state systems. *See* Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine,* 122 *U. Pa. L. Rev.* 1971, 1085-86 (1974). Always lurking is the possibility that despite substantial litigation, the parties will return to federal court without an authoritative resolution of the state law issue.[16] Moreover, there is the real possibility that the party who comes into court in an advantageous position may be advocating abstention either to temporarily retain an advantage or to keep it permanently by exhausting his opponent. Another tension is the apparent conflict between abstention, which burdens the plaintiff by forcing him to litigate his state and federal claims in two separate forums, and pendant jurisdiction, which gives the plaintiff a choice of a federal forum for his federal claims with-

[16]For example, in the case *sub judice,* there is some question whether petitioner has standing in Iowa state court to litigate the state constitutional issues, since neither it nor its members are within the class allegedly discriminated against. *See* Green v. Shama, — Ia. —, 217 N.W.2d 547, 556 (1974); Mid-America Pipeline Co. v. Iowa State Commerce Com'n., 255 Ia. 1304, 125 N.W.2d 801, 803-04 (1964).

out abandoning related state law claims. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966).

Because of the burden placed upon the parties, the Supreme Court has confined the discretion of federal courts to abstain within narrow limits. Time and again, the Supreme Court has pointed out that abstention is proper only where "special circumstances" are present. *See, e.g., Lake Carriers' Assn. v. MacMullen,* 406 U.S. 498,. 509 (1972), and cases cited therein. Perhaps the broadest formulation of the circumstances within which abstention is proper is found in Chief Justice Warren's opinion in *Harmon v. Forssenius,* 380 U.S. 528 (1965). Speaking for an eight member majority, Chief Justice Warren wrote that:

> Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication. The doctrine, however, contemplates that deference to state court adjudication only be made where the issue of state law is uncertain.

380 U.S. at 534 (citation omitted). From this analysis, we distill a two-fold test as a guide on making our decision. First, a federal court should only abstain where some important value unrelated to the precedential weight of the forum is involved; it is improper to abstain merely because state court pronouncements on state law issues are authoritative or because state courts are more familiar with state law. Second, state law must be sufficiently unclear that a substantial likelihood exists that a state court resolution of the state law issues will forward the goal that the abstention was meant to achieve. We think that this test explains the result reached by the Supreme Court in so-called *Pullman* type abstention cases, referring to the doctrine articulated in *Railroad Commission v. Pullman Co.,* 312 U.S. 496 (1941). *See, e.g., Lake Carriers' Assn. v. MacMullen, supra,* 406 U.S. at 510-12 (abstention). *Askew v. Hargrave,* 401 U.S. 476 (1971) (abstention); *Wisconsin v. Constantineau, supra,* (no abstention); *Fornaris v. Ridge Tool Co.,* 400 U.S. 41 (1970) (no abstention); *Reetz v. Bozanich,* 397 U.S. 82 (1970) (abstention); *Harmon v. Forssenius, supra,* 380 U.S. at 533-37 (no abstention); *Davis v. Mann,* 377 U.S. 678, 690-91 (1964) (no abstention); *Meridian v. Southern Bell Telephone &Telegraph Co.,* 358 U.S. 639 (1959) ((abstention).

The case before us does not even remotely meet these criteria. By upholding the state program against constitutional attack, we have not created the irritant in federal-state relations caused when a federal court either overturns on federal grounds a program that might be so tailored by the state court that it could pass federal scrutiny, or invalidates on state grounds such a program and the state court later upholds it against challenges of a similar nature. There is no interference with important functions peculiarly within the province of the state such as in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943). Unlike the plaintiff in *Burford,* petitioner here does not seek to "short circuit" a complex state administrative scheme; instead it is following a statutory scheme which mandates that there will be a federal assessment of the acquisition although state approval is also required. *See* 12 U.S.C. § 1842.

While some might argue that we are making a tentative decision on state law, we do not think that our decision is tentative within the meaning of the abstention doctrine. As will be discussed below, the state statute is clear and unambiguous, and there is ample legislative history to guide our interpretation. While the Iowa courts have not ruled on the validity of section 524.1805 under the Iowa Constitution, each provision relied on by the parties has a long history of consistent interpretation. We believe that before a federal court should abstain from making a "tentative" decision on state law, the chances of an erroneous interpretation must be great. Otherwise abstention would always be required on this ground. Obviously, the greater the history of consistent past interpretation, the less likely a federal court would be erroneous in its ruling.

Lastly, abstention to avoid a constitutional decision would not be profitable in this case. Often avoiding such a decision is not an end in itself, but is utilized as a means, such as to lessen federal-state tensions. However, as we stated earlier, there is no particular tension involved in our decision as we would uphold the statute against constitutional attack. Avoiding a constitutional decision appears to be an end in itself only where the issue is a particularly sensitive one, or is a decision that the court believes may have serious and perhaps unforseeable repercussions. Our decision here is neither sensitive nor likely to have serious repercussions. It is merely one in a long line of cases upholding against equal protection attack state economic regulatory statutes as having a rational basis.

Even if there were some significant interest supporting abstention, we do not believe that the second part of our test is met, that the issues of state law be uncertain. All the parties agree that the purpose behind the statute was

to allow Northwest to acquire banks as if it was an Iowa bank holding company instead of an out-of-state one. Hence, the uncertainty, if it exists at all, exists in the constitutional provisions. Howeaer, while the validity of section 524.1805 has never been considered by the Iowa Supreme Court, we believe that the Iowa court has ruled on the relevant provisions of the Iowa Constitution so often as to define their scope with certainty. In the words of Chief Justice Warren:

> If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modity the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction.

Harmon v. Forssenius, supra, 380 U.S. at 534-35. As demonstrated in part III of this opinion, the Iowa Constitutional issues are insubstantial and would not "render unnecessary or substantially modify the federal Constitutional question." We therefore find it unnecessary to abstain.

Appellants and Northwest rely heavily on *Reetz v. Bozanich,* 397 U.S. 82 (1970) to support their contention that abstention is called for in this case. While there are certain similarities between the two cases, a careful analysis reveals why *Reetz* was an appropriate case for abstention and the present case is not. In *Reetz,* a three-judge federal court declared that certain Alaska statutes and regulations thereunder concerning salmon net-gear licenses for commercial fisherman violated the equal protection clause. In so doing, the three-judge court did not consider the plaintiff's claims of unvalidity under two

provisions of the state constitution, both of which had never been interpreted by the Alaska Supreme Court. The United States Supreme Court reversed, holding that abstention was appropriate because of the presence of special circumstances. *Id.* at 86-87. The Court initially observed that a decision invalidating the program could be a federal-state irritant and noted that the constitutional provisions in question involved fishing, "an asset unique in its abundance in Alaska . . . the management of which is a matter of great state concern." The Court then recognized the uncertainty in the state constitutional law, concluding that the state court should be the first institution to put a judicial gloss on these never interpreted provisions. Moreover, the Court had noted earlier in the opinion that "[a] state court decision . . . could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship." Thus, unlike the case *sub judice* there was ample reason to abstain in *Reetz*. It is the lack of the very attributes that made abstention appropriate in *Reetz* that makes abstention inappropriate here.

V. CONCLUSION

Having concluded that we cannot abstain, but must decide the state and federal issues raised in this appeal, we hold, for the reasons stated in part III of this opinion, that the petition must be

Denied.

APPENDIX B

FEDERAL RESERVE SYSTEM
NORTHWEST BANCORPORATION

Order Approving Acquisition of Bank

Northwest Bancorporation, Minneapolis, Minnesota, a bank holding company within the meaning of the Bank Holding Company Act, has applied for the Board's approval under § 3(a)(3) of the Act (12 U.S.C. 1842(a)(3)) to acquire 90 per cent or more of the voting shares of Bettendorf Bank and Trust Company, Bettendorf, Iowa ("Bettendorf Bank"), and Security State Bank, Keokuk, Iowa ("Keokuk Bank").

Notice of the applications, affording opportunity for interested persons to submit comments and views, has been given in accordance with § 3(b) of the Act. The time for filing comments and views has expired, and all those received have been considered in light of the factors set forth in § 3(c) of the Act (12 U.S.C. 1842(c()). Among the comments and objections was a request for a hearing. The Board decided to proceed on the basis of written submissions and denied the request for a hearing.

Although each of the applications has been separately considered by the Board, because of the facts and circumstances common to these applications, this Order contains the Board's findings and conclusions with respect to both applications.

Applicant controls 79 banks located variously in Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota, and Wisconsin. Within Iowa, Northwest controls four banks with aggregate deposits of $480 million, representing 6.3 per cent of the total commercial bank deposits

in that State.[1] Applicant is the largest banking organization and bank holding company in Iowa, acquisition of Bettendorf Bank ($26 million in deposits) and Keokuk Bank ($13 million in deposits), would increase its share of Statewide deposits by only one-half of a percentage point. Approval of the proposed acquisitions would not result in any significant increase in the concentration of banking resources in Iowa.

Bettendorf Bank is the fourth largest of six banks competing in the Davenport-Bettendorf urban area, the relevant banking market, with 8.1 per cent of total market deposits.[2] The Davenport-Bettendorf market is dominated by the Davenport Bank and Trust Company, which controls nearly 58 per cent of market deposits, more than four times the share of the next largest bank. Affiliation with Applicant would enable Bettendorf Bank to provide greater competition to Davenport Bank. The acquisition should enable Applicant to challenge effectively the dominant bank much sooner than it could by a *de novo* entry.

Keokuk Bank is also the fourth largest banking organization in its market[3] where it competes with 4 banking organizations, and holds 8.6 per cent of market deposits. Keokuk Bank and State Central Savings Bank of Keokuk, the latter being the largest bank in the market, are controlled by the same group. Thus, acquisition of Keokuk Bank would tend to have a procompetitive effect in the relevant market by severing the present affiliation between two of the largest banks in Keokuk with the result-

[1]All banking data are as of June 30, 1972, and reflect bank holding company formations and acquisitions approved by the Board through May 31, 1973.

[2]Davenport-Bettendorf area makes up the western half of the Davenport-Moline-Rock Island SMSA.

ing creation, reasonably anticipated, of an additional banking alternative for area residents.

The proposed acquisitions represent Applicant's initial entries into these markets and offer no apparent anticompetitive consequences. In each instance no existing competition would be eliminated as the nearest present banking subsidiary of Applicant (the Iowa-Des Moines National Bank at Des Moines, Iowa) is situated about 160 miles west of Bettendorf and 170 miles northwest of Keokuk.[4]

There is no significant existing competition between Applicant's mortgage banking subsidiary, Iowa Securities Company, and Bettendorf Bank or Keokuk Bank. There appears to be little likelihood for the development of any significant amount of future competition between Applicant and banks in view of the distances separating them from Applicant's present and proposed subsidiaries, the presence of numerous intervening banks, and Iowa's restricitive branching laws. Although Applicant could enter either market *de novo,* or through the acquisition of a smaller bank, in neither instance is Applicant's acquisition regarded as having a substantially adverse effect on potential competition. While the areas do not appear attractive to *de novo* entry, the possibilities of other holding companies entering the market would not be precluded by the acquisitions. Size disparity among the top banks in Keokuk Bank's market is narrow enough so the Applicant's acquisition there would not give Applicant a dominant share of the market's banking resources. With re-

[3]Approximated by the southern half of Lee County, Iowa, the eastern half of Clark County, Missouri, and most of the western half of Hancock County, Illinois.

[4]Applicant has pending before the Board an application to acquire The First National Bank of Dubuque, Iowa, which is about 80 miles north of Betterndorf and 200 miles northeast of Des Moines.

spect to the Bettendorf-Davenport area, Davenport Bank and Trust Company is clearly the dominant institution and entry by Applicant will have a procompetitive effect.

The Board concludes, therefore, that competitive considerations are consistent with approval of the applications.

The financial the managerial resources and prospects of Applicant and its subsidiary banks are satisfactory; and Applicant has entered into a capital improvement program with respect to certain subsidiary banks. It is expected that Bettendorf Bank's affiliation with Applicant will strengthen that bank's financial and managerial resources, in view of Applicant's commitment to provide $600,000 in equity capital to bank within six months following acquisition. In view of the anticipated growth of the Bettendorf area, future prospects are satisfactory. With respect to Keokuk Bank, the managerial resources and financial condition and future prospects are satisfactory. Thus, considerations relating to the banking factors lend some weight to approval with respect to Bettendorf Bank, and are consistent with approval with respect to Keokuk Bank.

There is no evidence in the record that the banking needs of the relevant areas are not being adequately served by existing banking organizations. Affiliation with Applicant should enable Bettendorf Bank to compete more aggressively with the dominant bank in its market in light of the facts that Applicant proposes to open an additional office; renovate an existing office; augment Bettendorf Bank's ability to provide real estate mortgage financing; improve Bettendorf Bank's parking facilities; and provide whatever assistance is required to enable Bettendorf Bank to challenge successfully the dominant bank in the market. Keokuk Bank has low loan to asset and loan to deposit

ratios. Also, it directs a considerably lower proportion of its total loans to consumer borrowers than do other Keokuk banks. It is anticipated that affiliation with Applicant will result in a greater emphasis on consumer installment loans and residential mortgages. Both banks will benefit from access to the full range of services now available to other subsidiary banks of Applicant including, advisory services in the areas of accounting, audit, operations systems, taxes, market analysis, investment portfolio assistance, and credit overline handling. Considerations relating to the convenience and needs of the communities to be served, therfore, lend weight to approval. It is the Board's judgment that the proposed acquisitions would be in the public interest and that the applications should be approved.

The Board is also required to consider, whether either proposal would be prohibited by State law. If the proposal would be so prohibited, the Board may not approve it.[5] Section 3(d) of the Bank Holding Company Act (12 U.S.C. 1842(d)) prohibits bank holding companies from acquiring banks in States outside their principal State of Business unless the statute laws of the State in which such bank is located specifically authorizes such acquisition by language to that effect and not merely by implication. These applications involve the first State statute enacted to allow an out-of-State bank holding company to acquire a controlling interest in a bank in that State. The relevant State statute, section 524.1805 of the Iowa Code, provides that a foreign-based bank holding company could acquire a controlling interest in an Iowa bank if ". . . such bank holding company was on January 1, 1971, registered with

[5] *Whitney National Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965).

the federal reserve board as a bank holding company, and on that date owned at least two banks in this state." Applicant is the only bank holding company capable of qualifying under section 524.1805 of the Iowa Code.

Objectors' principal arguments are: Firstly, as Applicant is the only out-of-State bank holding company able to expand in Iowa, section 524.1850 of the Iowa Code constitutes a denial of the equal protection of the laws and due process provisions of the Fourteenth Amendment to the United States Constitution and also a violation of the Iowa Constitution; secondly, in enacting the Bank Holding Company Act and its Amendments, Congress did not intend to allow State legislatures to choose selectively which out-of-State bank holding company could enter the State; and finally, the proposed acquisitions would have an adverse effect on Iowa banking structure.

As required by *Whitney*, the Board considers the applicability and effect of State legislation, but the constitutional validity thereof is presumed,[6] and objectors' challenges to the constitutionality of the recently-enacted Iowa legislation in this matter are properly cognizable only by the judiciary. There is no dispute that the State legislature's intent was to enable Northwest Bancorporation to expand in Iowa by the acquisition of additional banks and the provisions of the Iowa statute accomplished the purpose.

Wth respect to objectors' second principal argument, section 7 of the Act (12 U.S.C. 1846) expressly reserves

[6]See Statement accompanying the Board's Order of March 9, 1973, approving to the extent permitted by State law, the proposal of NCNB Corporation, Charlotte, North Carolina, to operate a trust company in South Carolina (59 Federal Reserve *Bulletin* 305); and Board Order of April 26, 1973, denying proposal by Bankers Trust New York Corporation, New York, New York, to engage indirectly *de novo* in the performance of certain investment advisory activites (59 Federal Reserve *Bulletin* 364).

to the States the authority to adopt legislation in the exercise of their powers and jurisdiction with respect to banks, bank holding companies, and their subsidiaries. The U.S. Supreme Court in *Whitney* expressly instructed the Board to consider the applicability and effect of any such legislation. Thus, as the Board has previously indicated,[7] "irrespective of any doubt the Board may entertain as to the wisdom or desirability of a particular State enactment, the Board must, and will, respect, and act in light of, pertinent State legislative judgments."

Finally, objectors contend that the proposed acquisitions would have an adverse effect on Iowa banking. The Board notes that effective July 1, 1972, the Iowa Code was revised to prohibit acquisition of ownership or control of any bank by a bank holding company if as a result the banks owned or controlled by the holding company would have in the aggregate more than 8 per cent of the total time and demand deposits of all banks in the State.[8] The effect of this provision is to preserve the existing deconcentrated nature of Iowa banking. As of June 30, 1972, the four largest banking organizations and bank holding companies in Iowa controlled 17.8 per cent of Statewide deposits; the ten largest banking organizations held 23.9 per cent of deposits. The Board regards section 524.1802 of the Iowa Code as insuring that no bank holding company is able to expand by acquisition to such a degree that it can dominate Iowa banking. The 8 per cent ceiling imposes an effective limitation on future acquisitions by Northwest Bancorporation in Iowa since it would hold 6.84 per cent of Statewide deposits after these acquisitions.

Based upon the record, the applications are approved.

[7]*Ibid*, Bankers Trust Order of April 26, 1973, at 366.
[8]Section 524.1802 of the Iowa Code.

The transactions shall not be consummated (a) before the thirtieth calendar day following the effective date of this Order of (b) later than three months after the effective date of this Order, unless such period is extended for good cause by the Board, or by the Federal Reserve Bank of Minneapolis pursuant to delegated authority.

By order of the Board of Governors,[9] effective August 2, 1973.

(Signed) CHESTER B. FELDBERG
Secretary of the Board

[SEAL]

[9]Voting for this action: Vice Chairman Mitchell and Governors Brimmer, Sheehan, Bucher, and Holland. Absent and not voting: Chairman Burns and Governor Daane.

No. 74-1352

In the Supreme Court of the United States

OCTOBER TERM, 1974

IOWA INDEPENDENT BANKERS, PETITIONER

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

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MEMORANDUM FOR THE FEDERAL RESPONDENT

Petitioner, an association of 404 independent banks in Iowa, seeks review of a decision of the Court of Appeals for the District of Columbia Circuit (Pet. App. A) refusing to set aside an order of the Board of Governors of the Federal Reserve System. The Board's order approved the acquisition of two banks located in Iowa by intervenor-respondent Northwest Bancorporation, a "bank holding company" within the meaning of the Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U.S.C. 1841 *et seq.* (Pet. App. B).

Section 3(a) of the Bank Holding Company Act, 12 U.S.C. 1842(a), requires that the approval of the Federal Reserve Board be secured before "any bank holding company [may] acquire direct or indirect ownership or control of any voting shares of any bank, if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank." However, Section 3(d) of the Act prohibits a bank holding company from acquiring an interest in any bank located outside of the state in which the company maintains its principal place of business "unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." In 1972, the Iowa legislature passed a statute authorizing out-of-state bank holding companies that on January 1, 1971, were both registered with the Federal Reserve Board and owned at least two banks in Iowa to acquire interests in additional banks within the State. Iowa Code Ann. §524.1805 (Supp. 1974-1975). Northwest Bancorporation is the only bank holding company that satisfies these criteria.

Following enactment of Iowa Code §524.1805, Northwest applied to the Federal Reserve Board for approval of its proposed acquisitions of 90 percent or more of the voting shares of the Bettendorf Bank and Trust Company, Bettendorf, Iowa, and the Security State Bank, Keokuk, Iowa (R. 1-195, 230-360). By order dated August 2, 1973, the Board unanimously approved the acquisitions (Pet. App. B), holding that they were authorized by Iowa Code §524.1805 (Pet. App. B, pp. A-31 to A-32). The Board also considered, as it was required to do by Section 3(c) of the

Bank Holding Company Act,[1] the competitive effects of the proposed acquisitions, the financial and managerial resources and future prospects of Northwest and the banks involved, and the convenience and needs of the communities to be served. The Board found these aspects of the acquisitions to be consistent with approval of the applications (Pet. App. B, pp. A-28 to A-30). The Board declined petitioner's invitation to pass upon the constitutionality of Iowa Code §524.1805, determining that it had neither the authority nor the expertise to consider that issue.

Petitioner then filed a petition for review in the court of appeals, contending that Iowa Code §524.1805 violated both the United States and Iowa Constitutions and conflicted with federal law governing bank holding companies. The court of appeals rejected these contentions and refused to set aside the Board's order (Pet. App. A).

1. Petitioner's principal contention (Pet. 5-7) is that Iowa Code §524.1805 effects a denial of equal protection. The Board takes no position with respect either to the merits of that contention or to whether the issue it raises is sufficiently important to warrant the exercise of this Court's certiorari jurisdiction.

---

[1]Section 3(c) of the Act, 12 U.S.C. 1842(c), provides:

> The Board shall not approve—
>
> (1) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> (2) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint or trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
>
> In every case, the Board shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned, and the convenience and needs of the community to be served.

2. Petitioner also contends (Pet. 7-8) that implicit in the Bank Holding Company Act is a prohibition against state discrimination between out-of-state bank holding companies—that is, that under the Act the states must choose between extending the right to acquire in-state banks to all out-of-state bank holding companies and extending it to none. This contention was properly rejected by the court of appeals, which noted (Pet. App. A, p. A-12) that nothing in the Bank Holding Company Act supports petitioner's reading and that, to the contrary, Section 7 of the Act, 12 U.S.C. 1846, provides:

> The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

Nor does the legislative history support petitioner's view of the congressional intent. See 102 Cong. Rec. 6750-6758, 6854-6862 (1956).

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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Supreme Court, U. S.
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Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

MEMORANDUM OF INTERVENOR-RESPONDENT NORTHWEST BANCORPORATION

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MEMORANDUM OF INTERVENOR-RESPONDENT NORTHWEST BANCORPORATION

Opinion Below

The decision of the court below is reported at 511 F. 2d 1288 (D.C. Cir. 1975) (the printing of the decision in Appendix A to the Petition contains errors). The decision of the Board of Governors of the Federal Reserve System is reported at 38 Fed. Reg. 21531 (1973).

Issue Presented

Whether an approval by the Board of Governors of the Federal Reserve System of acquisition of banks by a bank holding company, based in part upon a state statute which distinguishes between out-of-state holding companies having some pre-existing stake in the state's banking system and those having no such stake, is a denial of any person's fourteenth amendment right to equal protection of the laws?

Statement of the Case

1. *The Parties.* Northwest Bancorporation ("Northwest"), is a bank holding company registered with the Board of Governors of the Federal Reserve System ("The Board"), under the Bank Holding Company Act. At the time of the instant applications, Northwest controlled four banks in Iowa which had been owned by Northwest since the late 1920's. Although it is the largest bank holding company in Iowa, Northwest's four Iowa banks had deposits constituting only 6.3 percent of the total bank deposits in the State. (A27-28)[1]

The Board is the federal agency charged with administration of the Bank Holding Company Act. *See* 12 U.S.C.A. §§1841(f), 1842-44, 1847.

Iowa Independent Bankers ("IIB") is an association of over 400 Iowa banks which call themselves "independent." The IIB member banks have deposits constituting over one-half of the total bank deposits in the State. The stated purpose of the association is "to preserve competition and to

[1]The order of the Board is reprinted in Appendix B to the Petition and the reference herein to the order are to that Appendix. There are also references herein to the Record in the court below ("R").

prevent undue concentration in the field of banking" (R211, 220, 388).[2]

2. *The Board's Order.* On August 2, 1973, the Board issued its order approving applications by Northwest to acquire two Iowa Banks.[3] The Board found that approval "would not result in any significant increase in the concentration of banking resources in Iowa," that the acquisitions would have procompetitive effects and would not eliminate any actual or likely future competition, that Northwest's financial and managerial resources would strengthen the two banks and that the acquisitions would enhance the two banks' ability to serve the communities' convenience and need. Accordingly, the Board held that "the proposed acquisitions would be in the public interest" (A28-31).[4]

The Board then examined the pertinent 1972 Iowa statute which provided that:

> "Nothing in this division shall be construed to authorize a bank holding company which is with respect to the state of Iowa an 'out-of-state bank holding company' . . . to acquire any . . . interest in . . . any bank in this state unless such bank holding company was on January 1, 1971, registered with the federal reserve board as a bank holding company, and on that date owned at least two banks in this state." Iowa Code Ann. §524.1805 (Supp. 1974-75).

[2]IIB has adopted resolutions opposing "expansion of multibank holding companies" and encouraging "the regulators on the national level to respect the historic right of the states to control and regulate . . . the formation and expansion of multibank holding companies." THE INDEPENDENT BANKER, Aug. 1973, at 27.

[3]Both applications had the support of the Iowa Superintendent of Banking, who stated that the acquisitions were in compliance with Iowa law, would benefit the respective banks and their customers, and would not threaten the competitive structure of banking (R201, 380-81).

[4]These findings were not contested by IIB in the Court of Appeals. 511 F.2d at 1292 n. 3.

Upon determining that Northwest owned at least two Iowa banks on January 1, 1971, the Board concluded that the statute authorized the acquisitions, but declined to pass upon IIB's claim that the Iowa statute was unconstitutional (A27-28, 32 & n. 6).

3. *The Court of Appeals' Decision.* On February 7, 1975, the United States Court of Appeals for the District of Columbia Circuit denied IIB's petition to set aside the Board's order. In an opinion by Judge Tamm, joined by Judges Leventhal and Merhige, the court sustained the constitutionality of the Iowa statute under both the federal and the state constitutions.

Argument

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The reasons for denial of the petition, which should be apparent from the Court of Appeals' well reasoned and thorough opinion, are summarized below.

1. The Decision Below Was Correct and Consistent with Decisions of This Court

The Court of Appeals, relying upon the equal protection decisions of this Court where fundamental rights and suspect classifications were not involved, properly limited its review to determining whether the Iowa statute bore a rational relationship to a legitimate state purpose. 511 F.2d at 1294. *See, e.g., Village of Belle Terre v. Boraas,* 416 U.S. 1, 6-8 (1974); *Dandridge* v. *Williams,* 397 U.S. 471, 484-86 (1970).

The court then examined the statute in question and its

legislative history and found the legitimate purpose and the rational relationship. The purpose of the Iowa statute, the court said, was "to allow all pre-existing bank holding companies, whether in-state or out-of-state, to compete on an equal basis, while preventing a new influx of out-of-state bank holding companies into Iowa." 511 F.2d at 1295. This legitimate purpose was then shown by the court to have a rational relationship to the distinction drawn in the statute between those out-of-state holding companies having a pre-existing stake in the Iowa banking system and those that did not. *Id.* at 1294-95.[5]

This result, as the court below pointed out, is fully consistent with the decisions of this Court upholding grandfather clauses in all sorts of statutes. *Id.* at 1295. *See, e.g., United States* v. *Maryland Savings-Share Ins. Corp.,* 400 U.S. 4 (1970); *Sampere* v. *New Orleans,* 279 U.S. 812 (1929), *aff'g per curiam,* 166 La. 776, 117 So. 827 (1928); *Watson* v. *Maryland,* 218 U.S. 173 (1910).

The result below is also consistent with this Court's pronouncements that legislatures may properly think evils in the same field may be of different proportions requiring different remedies, *Tigner* v. *Texas,* 310 U.S. 141 (1940), that legislatures may select one phase of a field and apply a remedy, neglecting others, and that reform takes one step at a time, *Semler* v. *Oregon State Bd. of Dental Examiners,* 294 U.S. 608 (1935); *Geduldig v. Aiello,* 417 U.S. 484 (1974); and that legislatures need not draw statutes to encompass hypothetical situations that may never become

[5]Although the Iowa statute speaks in terms of out-of-state holding companies controlling two or more Iowa banks, in fact Northwest was the only out-of-state holding company owning any Iowa banks at the critical date. 511 F.2d at 1294.

reality, *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).[6]

The only case that IIB can dredge up arguably to support its contentions is *Morey* v. *Doud*, 354 U.S. 457 (1957). But the statutory schemes here and in *Morey* are quite different. In *Morey*, there was an express exemption from a continuing regulatory scheme for only one of many existing companies. Here, on the other hand, as the court below pointed out, the statute was "not designed to bestow a benefit upon one competitor over all others, but merely to allow Northwest to compete on an equal basis with other Iowa banks." 511 F.2d at 1295-96. Thus, IIB's reliance on *Morey* is misplaced.[7]

2. There Is No Conflict in Decisions of the Courts of Appeal

IIB urges that certiorari be granted because of the pendency in this Court of *City of New Orleans* v. *Dukes*, 43 U.S.L.W. 3550 (No. 74-775), *appealing from*, 501 F.2d 706 (5th Cir. 1974). (Petition 7.)

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[6]Indeed, since IIB and its members are not in the class allegedly discriminated against and have not sustained some direct injury as a result of the application of the statute, serious questions of ripeness and standing would be potential barriers to this Court's consideration of the merits of IIB's petition. *Compare* 511 F.2d at 1293-94. *See, e.g., Brodrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973); *Roe v. Wade*, 410 U.S. 113, 127-29 (1973); *Laird* v. *Tatum*, 408 U.S. 1 (1972); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166-68 (1972); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972); *Abbott Labs* v. *Gardner*, 387 U.S. 136 (1967); *Poe v. Ullman*, 367 U.S. 497 (1961).

[7]It should be noted that the *Morey* case, a six-to-three decision, seems contrary to this Court's subsequent decisions rejecting equal protection challenges to economic regulations, *e.g., Ferguson* v. *Skrupa*, 372 U.S. 726 (1963), and to this Court's repeated reluctance to strike down economic legislation, *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

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But an analysis of the *Dukes* case reveals no inconsistency in the Circuits and thus no need to grant certiorari here. First, as the court below noted, the *Dukes* ordinance gave a monopoly to one person and forced out an existing competitor, while in the instant case, all bank holding companies similarly situated are treated the same and allowed to acquire Iowa banks, and no existing competitor was put at any disadvantage by the statute. *See* 511 F.2d at 1295-96 n. 7. Second, entirely different regulatory schemes are involved in *Dukes* and in the instant case. Indeed, in the instant case, the challenged statute relates to the complex, ever-evolving federal-state regulation of banking and bank holding companies, whereas in *Dukes* the subject-matter was the relatively simple, static municipal regulation of street peddling. Third, here, but not in *Dukes*, the court found a rational relationship between the statutory distinction and legitimate purpose. Fourth, in the instant case, no person within the jurisdiction of the state has been discriminated against or has suffered direct injury as a result of the statutory dstinction whereas the converse was true in *Dukes*.

3. There Is No Practical Occasion or Reason for Review of This Case by This Court.

Contrary to the suggestion of IIB (Petition 7-8), there is no practical reason for this Court to review this case, as the Iowa statute is the only statute of its kind in the United States.

Conclusion

For the foregoing reasons, Intervenor-Respondent Northwest Bancorporation respectfully requests that this Court deny the petition for a writ of certiorari.

Dated June 16, 1975.

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